Tafas v. Dudas et al
Doc. 258 Att. 9

EXHIBIT 5

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What and Where to Submit

A complete, original application may be electronically sent as an e-mail attachment to *tia.trout@usda.gov*. If applications are submitted electronically, a signature page must be submitted in hard copy or via fax. Alternatively, an original application package plus two paper copies may be submitted in hard copy to: Tia Trout, USDA National Rural Development Partnership, MAIL STOP 3205, Room 4225, 1400 Independence Ave., SW., Washington, DC 20250–3205.

Dated: February 3, 2003.

John Rosso,

Administrator, Rural Business-Cooperative Service.

Appendix A

Form of Recognition Agreement

Recognition Agreement Between [SRDC] and The United States Department of Agriculture (USDA)

Parties

SRDC Chair or Co-Chairs ____
SRDC Executive Director ____
USDA ____
Administrator—Rural Business-Cooperative Service

Purpose

The purpose of this Agreement is to confer recognition upon [SRDC] as the State Rural Development Council for the state of ____ a term ending May 13, 2007 unless earlier terminated for failure to maintain the requirements for ongoing eligibility pursuant to the Farm Security and Rural Investment Act of 2002 (the 2002 Farm Bill).

Background

The National Rural Development Partnership authorized by section 6021 of the 2002 Farm Bill is composed of a National Rural Development Coordinating Committee (the Coordinating Committee) and State Rural Development Councils. The purposes of the Partnership are to empower and build the capacity of States and rural communities to design flexible and innovative responses to their own special rural development needs, with local determinations of progress and selection of projects and activities. Accordingly, the legislation requires that a State Rural Development Council (1) be composed of representatives of Federal, State, local, and tribal governments, nonprofit organizations, regional organizations, the private sector, and other entities committed to rural advancement, (2) have a nonpartisan and nondiscriminatory membership that is broad and representative of the economic, social, and political diversity of the State, and (3) that the membership shall be responsible for the governance and operations of the State Rural Development Council.

Agreement

The [SRDC] hereby represents the following:

1. The membership of the SRDC meets and will continue to meet on an ongoing basis the eligibility requirements for recognition as a member of the NRDP set forth in the 2002 Farm Bill.

2. The entity which shall undertake fiscal responsibilities on behalf of the SRDC for purposes of any USDA funding is [name of Funding Entity/Address]. The officer who is authorized to enter into agreements on behalf of the Funding Entity is [Name, Title].

3. The person who is authorized to represent the SRDC in meetings of the NRDP and enter into contracts and receive notices on behalf of the SRDC is: [Name, Title, Address]

The [SRDC] hereby undertakes to perform the following duties:

1. Facilitate collaboration among Federal, State, local, and tribal governments and the private and nonprofit sectors in the planning and implementation of programs and policies that have an impact on rural areas of the State;

2. Monitor, report, and comment on policies and programs that address, or fail to address, the needs of the rural areas of the State; and

3. As part of the NRDP, in conjunction with the Coordinating Committee, facilitate the development of strategies to identify and reduce or eliminate conflicting or duplicative administrative or regulatory requirements of Federal, State, local, and tribal governments.

Furthermore, the [SRDC] agrees to:

(a) Provide to the Coordinating Committee an annual plan with goals and performance measures; and

(b) Submit to the Coordinating Committee an annual report on the progress of the [SRDC] in meeting the goals and measures.

The [SRDC] hereby agrees to provide matching funds or in-kind goods or services, as required by statute, to support the activities of the undersigned, in an amount that is at least 33 percent of the amount of Federal funds received from a Federal agency, except where the Federal funds in question are (a) to support one or more specific programs or project activities or (b) to reimburse the SRDC for services provided to the funding Federal agency.

The [SRDC] hereby agrees to provide evidence on an on-going basis that the SRDC is in compliance with this Agreement. For example, as and when the Council modifies its bylaws, organizational structure, rules of governance, and/or makes any other modifications that change the SRDC's structure or rules of operations, such changes must be provided to USDA immediately.

Furthermore, the [SRDC] understands that if it applies to USDA–RD for federal funding for its core operations, it must comply with all federal requirements regarding financial management, good standing, criminal convictions, debarment, civil rights and any other applicable laws.

Recognition

The USDA hereby recognizes [name of SRDC] as a State Rural Development Council and member of the National Rural Development Partnership. All correspondence shall be directed to USDA, care of [David Sears, National Partnership Office, email, telephone].

Programming, Budgeting, Funding, and Reimbursement Arrangement

This Recognition Agreement does not commit USDA or the federal government to provide any financial assistance.

Authority

The USDA authority for entering into this Recognition Agreement is Section 6021 of Public Law 107–171 (May 13, 2002). This Recognition Agreement is subject to Section 6021 of the 2002 Farm Bill, the Notice Inviting Applications for Recognition, future SRDC regulations not otherwise inconsistent with this Recognition Agreement and all other applicable laws.

Approvals

The signatories hereby certify that they have the authority to enter into this Recognition Agreement.

Revocation

Upon written notice from USDA of a failure to perform or other default under this Agreement, the SRDC has 90 days from the date of the USDA written notice to cure the failure to perform or the default. USDA may terminate this agreement, thereby revoking recognition, upon written notice to the SRDC for failure of the SRDC to cure a failure to perform or otherwise cure a default under this Recognition Agreement.

The SRDC may terminate this Recognition Agreement upon 90 days written notice to USDA.

Effective Date

This Recognition Agreement will become effective upon the signature of all parties and shall remain in effect until the earlier of May 13, 2007 or termination by either party. Its provisions can be amended or supplemented in writing as may be agreed upon.

____
Administrator
Rural Business-Cooperative Service Administrator

____
[Date]

____
[ ] Chair
SRDC

____
[Date]

____
[ ] Executive Director
SRDC

____
[Date]

[FR Doc. 03–4040 Filed 2–19–03; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF COMMERCE

[Docket No.: 030213030–3030–01]

Office of the General Counsel; Guidelines for the Proper Consideration of Small Entities in Rulemaking

AGENCY: Office of the General Counsel, Department of Commerce.

ACTION: Notice of availability.

SUMMARY: The Department of Commerce (Department) announces the availability of its guidelines for the proper consideration of small entities in agency rulemaking pursuant to Executive Order 13272. The purpose of these guidelines is to establish procedures and policies to promote compliance with the Regulatory Flexibility Act of 1980 (RFA). These guidelines ensure that the Department properly considers the potential impacts of its rulemakings on small business, small governmental jurisdictions, and small organizations during the rulemaking process.

ADDRESSES: To obtain a copy of the Department's guidelines, please send a written request to Daniel Cohen, Chief Counsel for Regulation, Office of the Assistant General Counsel for Legislation and Regulation, U.S. Department of Commerce, 1401 Constitution Ave., Suite 5876, Washington, DC 20230, or visit the following Web site: *http://www.ogc.doc.gov/ogc/legreg/regulati.htm*.

FOR FURTHER INFORMATION CONTACT: For further information, please contact Tricia Choe, Attorney-Advisor, Office of the Assistant General Counsel for Legislation at (202) 482–4265.

SUPPLEMENTARY INFORMATION: On August 13, 2002, the President signed Executive Order 13272 entitled Proper Consideration of Small Entities in Agency Rulemaking. Executive Order 13272 requires federal agencies to issue policies and procedures to ensure that the potential impacts of agency rules in small businesses, small organizations, and small governmental jurisdictions are properly considered during the rulemaking process consistent with the statutory mandates of the Regulatory Flexibility Act of 1980 (RFA). *See* 5 U.S.C. 601 *et seq.* The intent of the Order is to ensure that agencies work closely with the Office of Advocacy at the Small Business Administration to address small business issues as early as possible in the regulatory process, particularly as they relate to disproportionate regulatory burden.

Pursuant to the requirements of the Order, the Department of Commerce prepared guidelines that establish procedures and policies ensuring compliance with the RFA. These guidelines ensure that the Department properly considers the potential impacts of rules on small business, small governmental jurisdictions, and small organizations during the rulemaking process. Specifically, the document provides guidance concerning the formulation of the initial regulatory flexibility analysis and final regulatory flexibility analysis, the certification process, and the SBA review process.

On November 13, 2002, the Department submitted a draft of the guidelines to SBA for review and comment. After reviewing the guidelines, SBA requested that the Department make minor editorial revisions and include the Department's procedure for notifying SBA of proposed rules that may have a significant economic impact on a substantial number of small entities. The Department addressed all of SBA's comments. The Department now makes available to the public its guidelines. To obtain a copy of the guidelines, please see the **ADDRESSES** section of this notice.

Dated: February 13, 2003.

Theodore W. Kassinger,

General Counsel, Department of Commerce.

[FR Doc. 03–4032 Filed 2–19–03; 8:45 am]

BILLING CODE 3510–BW–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-201–809]

Certain Cut-to-Length Carbon Steel Plate From Mexico: Notice of Final Court Decision and Amended Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Final Court Decision and Amended Final Results of Antidumping Duty Administrative Review.

SUMMARY: On November 12, 2002, the United States Court of International Trade (CIT) affirmed the remand determination of the Department of Commerce (the Department) in the 1997–98 administrative review for Altos Hornos de Mexico, S.A. de C.V. (AHMSA) arising from the antidumping duty order on certain cut-to-length carbon steel plate from Mexico. *See Altos Hornos de Mexico, S.A. de C.V. v. United States of America, Bethlehem Steel Corporation and United States Steel Corporation*, Consol. Ct. No. 01–00018, Slip Op. 02–136 (CIT November 12, 2002) (the November 12, 2002 Court order). As there is now a final court decision, we are amending the amended final results of the review in this matter. We will instruct the U.S. Customs Service to liquidate entries subject to these amended final results.

EFFECTIVE DATE: February 20, 2003.

FOR FURTHER INFORMATION CONTACT: Thomas Killiam or Michael Heaney, Antidumping/Countervailing Duty Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street N.W. and Constitution Avenue, N.W.,Washington D.C. 20230; telephone (202) 482–5222 or (202) 482–4475, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 19, 1993, the Department published the antidumping duty order on steel plate from Mexico (58 FR 44165). On February 18, 2000, the Department published the final results of the 1997–1998 administrative review. *See Certain Cut-to-Length Carbon Steel Plate From Mexico: Final Results of Antidumping Duty Administrative Review*, 65 FR 8338, February 18, 2000. The Department published three successive sets of amended results, on November 2, 2000 (65 FR 65830), December 12, 2000 (65 FR 77566), and January 24, 2001 (66 FR 7619).

Following the January 24, 2001 amended results, the foreign producer, AHMSA, contested certain aspects of the Department's final and amended final results at the CIT. The Department requested a voluntary remand, and on April 15, 2002, the CIT remanded the amended final results to the Department. On June 28, 2002, the Department issued its remand redetermination. *See Redetermination Pursuant to Court Remand Order in Altos Hornos de Mexico, S.A. de C.V. v. United States, et. al.*, Court No. 01–00018, June 28, 2002. *See also* Memorandum to the File from T. Killiam, Case Analyst, ''Analysis of Programming Revisions in the Final Remand Results of Review of Cut-to-Length Carbon Steel Plate from Mexico A-201–809), June 28, 2002; and Memorandum to Neal Halper, Director, Office of Accounting, from Peter S. Scholl, Senior Accountant, ''Final Remand Redetermination - Antidumping Duty Administrative Review of Certain Cut-to-Length Carbon Steel Plate from Mexico,'' June 28, 2002. In the remand determination, the Department used historical and inflation-adjusted information previously placed on the record by AHMSA to calculate a revised financial expense rate, and applied this revised rate to AHMSA's historical cost of manufacturing.

On November 12, 2002, the CIT sustained the Department's remand results.

GUIDELINES FOR PROPER CONSIDERATION OF

SMALL ENTITIES IN AGENCY RULEMAKING

- INTRODUCTION

Pursuant to Executive Order 13272, the purpose of this document is to establish procedures and policies to promote compliance with the Regulatory Flexibility Act of 1980 (RFA)[(1)]. This guidance ensures that the Department properly considers the potential impacts of rules on small business, small governmental jurisdictions, and small organizations during the rulemaking process.

II. REGULATORY FLEXIBILITY ACT PROCESS AND ANALYSIS

The purpose of the RFA is to have agencies consider, when issuing regulations, establishing regulatory and informational requirements that fit the scale of businesses, organizations, and governmental jurisdictions subject to regulation consistent with the objectives of the rule and of applicable statutes. To achieve this purpose, the Department is required to solicit and consider flexible regulatory proposals and to explain the rationale for its actions to assure that such proposals are given serious consideration.

A Regulatory Flexibility Act Analysis (RFAA), an Initial Regulatory Flexibility Act Analysis (IRFA) and/or a Final Regulatory Flexibility Act Analysis (FRFA), is necessary to satisfy the requirements of the RFA. The RFAA should assess the impacts of the proposed/final rule on small entities and describe steps the Department has taken to minimize any significant economic impact on small entities while still achieving regulatory goals. The general intent of the RFAA analytical and process requirements is to make the decision process open and transparent so that all can understand the what, where, and why of regulatory decision-making and can agree that the required steps of the process were followed. The economic analysis provides decision-makers and the public with the Department's best estimates of the impacts of proposed actions and of their alternatives. Under the RFA, an agency does not need to conduct an IRFA or FRFA if a certification can be made that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities.

It should be emphasized that the RFA does not require that the alternative with the least cost or with the least impact on small entities be selected as the preferred alternative. The RFA does not contain any decision criteria; instead the purpose of the RFA is to inform the Department, as well as the public, of the expected economic impacts of the various alternatives contained in the rule and to ensure that the Department considers alternatives that minimize the expected impacts while meeting the goals and objectives of the applicable statutes. Note that, when an FRFA is prepared, it must include a statement of the factual, policy, and legal reasons for selecting the alternative adopted and explain why each of the other significant alternatives that minimize the expected economic impacts on small entities was rejected.

A good RFAA will ensure that --

- **•Reasonable alternatives from among which to select a proposal are identified and analyzed.**
- **•The proposal selected reflects a wise choice from among reasonable alternatives.**
- **•Managers have considered the arguments supporting or against the various alternatives.**
- **•The proposal does not conflict with other social goals.**
- **•The proposal will move rapidly through the regulatory process at OMB and SBA's Office of Advocacy.**
- **•The proposal is more likely to withstand legal challenges.**

There is some uncertainty as to whether an RFAA must address the impacts of a proposed rule on only small entities subject to the regulation (i.e., small entities to which the rule will apply) or on all small entities that are affected by the regulation. The uncertainty results from the use of such language as "small entities to which the proposed rule will apply," "small entities that will be subject to the regulation," " the impact of the proposed rule on small entities," and "a significant economic impact on a substantial number of small entities." The Department's interpretation places an outer limit on the number of entities that the analysis should consider as only those to which the rule will apply. In addition, this guidance provides for examining subsets of entities to which the rule will apply if the rule is likely to affect some of those entities differently than others.

The importance of this ambiguity is decreased substantially, if not eliminated, by the fact that Executive Order 12866 requires analysis of the burden of regulations on small entities. This requirement is contained in the eleventh principle of that Order. Thus, if the economic impact on all small entities that would be affected by the proposed rule is analyzed pursuant to Executive Order 12866, the RFAA need only analyze the economic impact on small entities to which the proposed rule will apply.

II.1. Steps for Complying with Executive Order 13272

In order to properly consider the impacts of a rule on small entities, the following analyses should be conducted during the rulemaking process.

II.1.a Identifying the Number of Small Entities

In completing an RFAA, it is necessary to estimate the number of small entities to which the rule applies. The RFA recognizes and defines three kinds of small entities: small businesses, small organizations, and small governmental jurisdictions. The established size standards are as follows:

A small business is any business that meets the size standards set forth in part 121 of Title 13,

Code of Federal Regulations (CFR). Part 121 sets forth, by the North American Industry Classification System (NACIS), the maximum number of employees or maximum average annual receipts a business may have to be considered a small entity.[(2)] Provision is made for an agency to develop industry-specific definitions. The NACIS is available on the following web site: http://www.sba.gov/size/sizetable2002.html

A small organization is any not-for-profit enterprise that is independently owned and operated and not dominant in its field.[(3)]

A small government jurisdiction is any government or district with a population of less than 50,000.[(4)]

II.1.b Preliminary Regulatory Economic Evaluation

Although there are no statutory requirements to do so, it is recommended that a preliminary evaluation describing the expected economic effects of the selected alternatives be undertaken when the alternatives are developed but before a preferred alternative is identified and certainly, before the Department approves any regulatory action. The primary intent for this recommended analysis is to provide early consideration of economic effects of regulatory action, not to delay or put up roadblocks to action.

In addition, such preliminary economic analyses could be used to solicit early public comments on the expected economic effects of the alternatives proposed and a platform from which information could be obtained to address the requirements of various applicable laws (e.g., Executive Order 12866 and the RFA).

For purposes of these guidelines, this preliminary analysis will be labeled a "Preliminary Regulatory Economic Evaluation" (PREE). The PREE should describe the general economic effects that may be reasonably anticipated to occur upon implementation of an action. In keeping with applicable law (E.O. 12866 and the RFA), these effects may include effects on net benefits, distributive impacts, and small and large entities.

Depending on the specificity of the alternatives and the number and complexity of proposed alternatives, the PREE may be largely qualitative or may provide quantitative estimates of economic impact. At a minimum, a qualitative discussion of the expected economic impacts of the proposed alternatives should be provided. A quantitative analysis should be substituted for qualitative assessments when available data and resources are available. However, given the preliminary nature of the analysis, the analyst should use reasoned judgment in determining the level of analysis necessary for a particular issue. Regardless of which approach is used (qualitative, quantitative, or a combination of both), the PREE should provide the reader with an overall framework for assessing economic impacts.

II.1.c. Certification Process

The RFA allows the Department to decide whether to conduct a full RFAA or to certify that the proposed and/or final rule would not have a "significant economic impact on a substantial number of small entities." This determination can be made at either the proposed and/or final rule stage. If the Department can certify, it will not be required to perform an IRFA or a FRFA, prepare a "Small Entity Compliance Guide" (Guide), or undertake a periodic review of such rules.

The information from the PREE or from other relevant economic analysis will indicate whether there is a factual basis to certify that the preferred alternative would not have a "significant economic impact on a substantial number of small entities." If such factual basis exists, the Department has the option of certifying.

The decision on whether to attempt certification or to apply certification criteria should be made after the final decision on the preferred alternative. This will ensure that this process is done only once for a particular regulatory action.

Using analyses and rationale from the PREE, a memorandum from the Chief Counsel for Regulation (CC/Regs) of the Department of Commerce[(5)] to the Chief Counsel for Advocacy of the Office of Advocacy at the U.S. Small Business Administration (SBA) is prepared certifying and setting forth the factual basis for the certification. Generally, the body of the letter is quoted in an appropriate location in the preamble of the proposed rulemaking. The CC/Regs will sign and transmit the certification to SBA at the time the notice of proposed rulemaking or final rulemaking is published in the Federal Register, along with a statement providing the factual basis for such certification.

"Boilerplate" notice language should not be used by the Department in its statement on the factual basis for a certification or in the equally important ancillary requests for public comment. If the Department has conducted the appropriate analysis, it can offer clear, concise, declarative statements that address each of the six points below and reflect the specifics of the proposed rule.

The Office of Advocacy at the SBA recommends that the certification statement include the following:

- **A statement of basis and purpose of the rule. This should include the statutory basis for the regulation, and the objectives of the rule including a brief description of the context.**
- **A description and estimate of the number of small entities to which the rule applies. This should describe how the universe of regulated entities was determined (and segmented) and details on the relevant economic and functional characteristics of those entities. This element should provide clear information on the range and scope of the regulation and the analysis which supports the certification.**
- **An estimate of economic impacts on small entities, by entity size and industry. This**

should include the rationale for the certification decision, based on the criteria specified in the next element, as well as a summary of the basic analysis supporting that determination. The emphasis is on financial analysis rather than economic (opportunity cost) analysis, per se, although, in some circumstances, the two may differ slightly. The analysis should be presented in a manner which enhances public review.

- **An explanation of the criteria used to evaluate whether the rule would impose "significant economic impacts". These guidelines suggest two criteria to consider in determining the significance of regulatory impacts, namely, disproportionality and profitability(6). These criteria relate to the basic purpose of the RFA, i.e., to consider the effect of regulations on small businesses and other small entities, recognizing that regulations are frequently unable to provide short-term cash reserves to finance operations through several months or years until their positive effects start paying off. If either criterion is met for a substantial number of small entities, the rule should not be certified.**

Disproportionality. Do the regulations place a substantial number of small entities at a significant competitive disadvantage to large entities? If the answer is "Yes," the rule should not be certified.

Whenever a disproportional effect on profits, costs, or net revenues is expected to occur for a substantial number of small entities, the test is met, and the rule should not be certified.

This criterion compares the effect of the regulatory action between small and large entities (using the SBA approved size definition of "small" entity), not the difference between segments of small entities(7). However, if an appreciable segment of small entities is disproportionally affected relative to large entities, even if the average small entity is not affected, the test would also be met, and the rule should not be certified.

Profitability. Does the regulation significantly reduce profit for a substantial number of small entities? If the answer is "Yes," the rule should not be certified.

The thrust of the analysis should be short- and medium-term in nature. While 1 year may be considered short-term, the analyst may consider shorter periods, e.g., 6 months or longer periods, e.g., 2 years, after which the regulation sunsets. Whichever period is selected, the analyst must provide a rationale for that choice as well as a discussion of how the findings may be affected by the choice.

Profit is a widely used term and is generally understood to be the result of subtracting costs from gross receipts over a period of time. Defined in this manner, calculation of profit will be affected by differences in both cost accounting conventions and accounting conventions applied to gross receipts. In general, the analysis should focus on the ability of the firm to meet both short-term (operating costs plus payments on other short-term obligations) and long-term debt (principal and interest payments on plant and equipment) obligations using generally accepted accounting practices (GAAP) for the regulated industry. The selected accounting practices will depend upon available data. Whichever accounting rules are selected, the analyst must describe the assumptions and should discuss how the findings may be affected by these assumptions.

Ultimately, the question the RFA analysis needs to answer is whether in the short- and medium-term, the costs (or reduction in revenues) imposed by the regulation can be absorbed by the firm (due to higher than average profitability) or passed on to its customers. If these costs (or reductions in revenues) cannot be absorbed so that either profits are reduced significantly or the solvency (ability to meet long term debt payments) of a substantial number of small entities is clearly threatened, then the impact of the rule is significant and the Department should not certify.

- **An explanation of the criteria used to evaluate whether the rule would impose impacts on "a substantial number" of small entities.**

The term "substantial number" has no specific statutory definition and the criterion does not lend itself to objective standards applicable across all regulatory actions. Rather, "substantial number" depends upon the context of the action, the problem to be addressed, and the structure of the regulated industry. The SBA casts "substantial" within the context of "more than just a few".[(8)] In some cases consideration of "substantial number" may go beyond merely counting the number of regulated small entities that are impacted significantly. An industry may have a large number of participants, but only a few of them may account for the majority of activity. In such cases, a substantial number of small entities may be significantly impacted, even though there may be a large number of insignificantly impacted small entities.

In a borderline case, the rule's effect on the structure of the regulated industry or the controversiality of the rule might tip the balance in favor of determining that a substantial number of entities would be affected.

- **A description of, and an explanation of the basis for, assumptions used. This should describe the data sources and analytical methods used in the analyses, variability, and uncertainty in the cost and revenue estimates, explain the assumptions used, and indicate the extent to which the results were affected by those assumptions.**

II.1.d. Initial Regulatory Flexibility Analysis

The RFA identifies the elements that should be included in the IRFA (5 U.S.C. § 603(b) & (c)). They are as follows:

A description of the reasons why action by the Department is being considered.

A succinct statement of the objectives of, and legal basis for, the proposed rule.

A description and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.

A description of the projected reporting, record-keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirements of the report or record.

An identification, to the extent practicable, of all relevant Federal rules, which may duplicate, overlap, or conflict with the proposed rule.

Each IRFA shall also contain a description of any significant[(9)] alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of the applicable statutes, the analysis shall discuss significant alternatives such as --

The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities.

The clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities.

The use of performance rather than the design of standards.

An exemption from coverage of the rule, or any part thereof, for such small entities.

The IRFA should estimate the costs associated with each of the selected alternatives and identify the classes of small entities that will be subjected to the costs. The relevant costs include both direct compliance costs, reporting, record keeping, and other administrative costs. Note that compliance costs are broadly defined to include the value of forgone opportunities, increased operating costs, and costs associated with higher levels of debt servicing. The IRFA should compare the costs of compliance for small and large entities to determine whether any small entities are disproportionately affected. If all entities in the industry are small entities, the costs imposed on the typical, representative, median, or average entity in a particular segment of the industry should be analyzed. The resulting effects of business closures on production and employment in each segment should be estimated

As indicated above, the RFA requires consideration of alternatives that accomplish the stated objectives of the applicable statutes and that minimize any significant economic impacts on small entities. The IRFA should identify any significant alternatives considered that would minimize economic impacts on small entities, if such alternatives exist. The RFA requires that the alternatives be part of the IRFA to ensure that the public will have adequate opportunity to comment on them and to suggest other alternatives. If there is an alternative with less of an impact on small entities that meets the stated objectives, the IRFA should explain why the preferred alternative was selected over the alternative with lower impact.

II.1.e. The Final Regulatory Flexibility Analysis

The RFA identifies the elements that should be in the FRFA in addition to the analysis of impacts (5 U.S.C. § 604(a)):

- **•A succinct statement of the need for, and objectives of, the rule.**
- **•A summary of the significant issues raised by the public comments in response to the IRFA, a summary of the assessment of the Department of such issues, and a statement of any changes made in the proposed rule as a result of such comments.**
- **•A description and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.**
- **•A description of the projected reporting, record-keeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for the preparation of the report or record.**
- **•A description of the steps the Department has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and the reason that each one of the other significant alternatives to the rule considered by the Department which affect small entities was rejected.**

The FRFA may be based on the IRFA but should reflect new data developed during the comment period and comply with the above requirements. Often, in order to comply, the FRFA will consist of the IRFA and of portions of the preamble to the final rule. The remaining sections deal with process rather than analysis.

II.2 Notification and Submission of Draft Rules to the Office of Advocacy at SBA

For all rules for which the Department has prepared an initial regulatory flexibility analysis or a final regulatory flexibility analysis, the CC/Regs of the Department of Commerce will notify the Office of Advocacy at SBA of the rule (i) at the time the Department submits the rule to the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) pursuant to Executive Order 12866, if that order requires such a submission, or (ii) if no submission is required to OIRA, at a reasonable time prior to publication of the proposed rule in the Federal Register. The Department will give appropriate consideration to any comments provided by the Office of Advocacy regarding the proposed rule.

The Department must include in the final rule the Department's response to any written comments submitted by the Office of Advocacy on the proposed rule that preceded the final rule.

II.3 Small Entities Compliance Guide

For each final rule or group of related rules for which the Department is required to publish an FRFA, the Department is required to publish one or more guides to assist small entities in complying with the rule. A "Small Entity Compliance Guide" (Guide) must explain the actions a small entity is required to take to comply with the rule or group of rules. The Guide is to be written using sufficiently plain language so that it can be understood by regulated small entities. The Department's Guide is not subject to judicial review. However, in any civil or administrative enforcement action against a small entity for a regulatory violation, the content of the Guide may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties, or damages.

II.4. Waiving or Delaying the Preparation of an RFAA

The requirement to prepare some or all of an IRFA may be waived or delayed by the Department when an emergency makes compliance impracticable. To effectuate such a delay or waiver, a notice must be published in the Federal Register, no later than the date of publication of the final rule. That publication must include a written finding, with reasons therefore, that the final rule is being promulgated in response to an emergency that makes timely compliance with the requirements to prepare an IRFA impracticable.

The Department may delay completion of an FRFA up to 180 days after the final rule is published in the Federal Register, by publishing in the Federal Register, no later than the date of publication of the final rule, a written finding, with reasons that the final rule is being promulgated in response to an emergency that makes compliance with the requirements to prepare an FRFA impracticable. Note that preparation of an FRFA may not be waived. The rule will lapse and have no effect if an FRFA is not prepared within 180 days after the final rule is published. Further, the rule may not be re-promulgated until an FRFA has been prepared.

II.5. Relationship of the Regulatory Flexibility Act to Other Applicable Law

The RFA requires that the Department identify and consider alternatives that minimize the impacts of a regulation on small entities subject to the regulation, but it does not require that the

Department select any particular alternative, such as the alternative with the least cost or with the least impact on small entities. However, if there is an alternative (other than the preferred) with less of an impact on small entities, rationale must be provided for selecting the preferred over that alternative. Section 606 of the RFA (5 U.S.C. § 606) states that the requirements to prepare an IRFA and an FRFA do not alter standards otherwise applicable by law to agency action.

II.6. Involvement of Small Entities in the Rulemaking

The RFA mandates that, if a rule will have a significant economic impact on small entities, the agency involved will take steps to assure that small entities will have an opportunity to participate in the rulemaking. Possible steps suggested by the RFA include the following:

- **•Providing a statement accompanying the advanced notice of rulemaking that the proposed rule might have a significant economic impact on a substantial number of small entities.**
- **•Publishing a notice in publications likely to be obtained by small entities.**
- **•Directly notifying affected parties, including representatives of participants in adjacent areas.**
- **•Conducting open conferences or public hearings, intending to include representatives from the industry that might be affected by possible regulatory changes**

Public notification of each of these meetings is required, and public testimony is routinely taken. Further, some public meetings are recorded, and meeting summaries may be prepared. A record of the number of opportunities for small entity input may be constructed by listing the dates and locations of each public meeting held in which the proposed regulation was discussed. This record may be enhanced by including meeting summaries, attendance lists, and key issues identified by small entities. In many cases, this will satisfy the RFA requirements for public input (which must be documented in the FRFA).

II.7. Periodic Review of Significant Rules

The RFA requires the Department to plan for the periodic review of agency-issued rules that have or will have a significant economic impact on a substantial number of small entities (5 U.S.C. § 610). The purpose of this review is to determine whether such rules should be continued without change, amended, or rescinded, consistent with the stated objectives of the applicable statutes. In reviewing the rules to minimize any significant economic impact of the rule on a substantial number of small entities, the RFA requires consideration of the following factors:

- **•The continued need for the rule;**
- **•The nature of complaints or comments received concerning the rule from the public;**

- **•The complexity of the rule;**
- **•The extent to which the rule overlaps, duplicates, or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and**
- **•The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.**

Although it is not necessarily the responsibility of the analyst to conduct the periodic review, the analyst may be called upon to provide information needed for the review, specifically regarding the first and last factors listed above.

Appropriate analysis during the early stages of the Department's decision-making process, as proposed in these guidelines, will help to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions and small organizations as provided by the RFA.

1. Pub. L. No. 96-354, 94 Stat. 1164 (codified as amended at 5 U.S.C. § 601 *et seq.*).

2. ***See* 13 C.F.R. § 121.201 (2002).**

3. *See* 5 U.S.C. § 601(4); *see also* Office of Advocacy, U. S. Small Business Administration, The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies 12 (2002) (hereinafter Implementation Guide).

4. *See* 5 U.S.C. § 601(5); *see also* Implementation Guide, *supra* note 3, at 12.

5. **For actions of the United States Patent and Trademark Office (USPTO)deemed "not significant" pursuant to procedures in Department Organizational Order 10-14, this memorandum will be prepared and certified by the Deputy General Counsel for General Law, USPTO.**

6. The concept of profitability may not be appropriate for a non-profit small organization or a small government jurisdiction. For these groups, disproportionality may be the appropriate standard.

7. Impacts within segments of small entities can be evaluated by the second criterion.

8. *See* Implementation Guide, *supra* note 3, at 19.

9. Note that the selected alternatives are those that the Department considers to be significant alternatives.